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No. 71-65

In the Supreme Court of the United States

OCTOBER TERM, 1971

ALFREDO PUCHI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 441 F.2d 697.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1971. A petition for rehearing was denied on June 7, 1971 (Pet. App. 10a). On July 9, 1971, Mr. Justice Harlan extended petitioner's time within which to petition for certiorari until July 17,

1971; the petition was filed on July 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case petitioner was prejudiced by the district court's exclusion from evidence of a recorded telephone conversation between a government agent and petitioner's accomplice in which the agent allegedly solicited false testimony.

2. Whether the denial of petitioner's request, under Rule 15(a), Fed. R. Crim. P., for an order authorizing him to take his accomplice's deposition in Mexico was an abuse of the court's discretion.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on Count Two of a three-count indictment, which charged him and a codefendant with selling ten cases of whiskey, the immediate containers of which did not have affixed to them stamps evidencing compliance with the revenue laws, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (Pet. App. 1a-2a).[1] On November 3, 1969, he was sentenced to one

[1] Petitioner was acquitted on the other two counts, which charged different offenses relating to the same distilled liquor (Pet. App. 2a). The codefendant, who was referred to in the indictment as "Joe 'Doe,'" is Jose Cruz Velez, a resident and national of Mexico who has not been apprehended. A bench warrant for his arrest is outstanding, but it has not been

year's imprisonment and fined $10,000; execution of the prison sentence was suspended for two years on condition that he violates no law of the United States or of any state and pays the fine within 60 days (Pet. App. 2a). The court of appeals affirmed (Pet. App. 1a-9a), and denied a petition for rehearing (Pet. App. 10a).

Petitioner was the secretary and treasurer of Imports-Exports, Inc., a bonded warehouse in Nogales, Arizona, near the Mexican border. The warehouse imported liquor and other merchandise from abroad for exportation from the United States; no duties or taxes are required to be paid on the imported merchandise. Merchandise is shipped directly to the warehouse, where it is stored under lock and key and kept under the constant surveillance of a Customs officer. When it is to be exported from the United States, it is transferred to a sealed vehicle for transportation either to the airport in Nogales or to the Mexican border. A Customs officer accompanies the merchandise in the vehicle and attests to the fact that the goods have been loaded into an aircraft, or transported into Mexico, by signing certain documents (Pet. App. 3a).

During the week of December 16, 1968, James Mitchell, manager of the Tidelands Motor Inn in Tucson, Arizona, discussed the purchase of liquor for the inn with two of petitioner's associates, Hector Miller and Ruben Serna, in the lounge of the inn (Tr.

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executed because Velez has remained outside the United States since completion of the transactions involved in this action (Pet. App. 1a, 5a).

388-395).[2] Petitioner was present but took no part in the conversation, and Mitchell was unsure how much of it, if any, he had overheard (Tr. 390-393, 424). Mitchell expressed disbelief to Miller at the low prices that Serna had quoted in an earlier conversation, but Miller confirmed the prices and invited Mitchell to visit Imports-Exports (Tr. 394-395).

On December 22, 1968, Mitchell visited the warehouse, spoke briefly with petitioner (who was busy in the office) and was shown the premises by Miller (Tr. 395-396). He saw the duty-free export prices that were posted on the premises and was told by Miller that he could buy liquor at those prices, but that he would have to order a minimum of ten cases because a truck driver could "get arrested just as much for one as for ten." (Tr. 395-396, 613-614, 927.)

On March 25, 1969, in a telephone conversation with petitioner which Customs agents recorded with Mitchell's permission (Tr. 93, 397), Mitchell said that he was ready to do business; he asked if petitioner was still interested in "helping my liquor costs" (A. 2). Petitioner responded that he was and asked

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[2] "Tr." refers to the trial transcript, in five consecutively paginated volumes. "Post Tr." refers to the one-volume transcript of the proceedings of November 3, 1969, held in connection with a motion for a new trial and sentencing. "A." and "B." refer to Appendices A and B to the government's brief in the court of appeals (copies of government trial exhibits 25 and 26), consisting of the transcripts of two telephone conversations between Mitchell and petitioner (held on March 25 and April 3, 1969, respectively) which United States Customs agents recorded with Mitchell's permission. Copies of these documents are being lodged with the Court.

what Mitchell needed. Mitchell stated that he was primarily interested in "V. O." and other brands of Scotch (A. 2). After ascertaining that Mitchell intended to purchase at least ten cases, petitioner said he had something that would be "very good"—"Haig and Haig Pinch" with "the strip stamp on it"—at a price ($48 per case) so low that Mitchell could put it "in the well" (serve it as "bar" Scotch to patrons who do not specify a brand) (A. 2-3; Tr. 660). Mitchell asked if the strip stamp (the imprinted seal-type stamp that is affixed to bottles of distilled spirits to indicate that the federal tax has been paid on the contents, see Tr. 244) meant that he would not have to be "as careful"; petitioner responded: "Right" (A. 3). In response to an inquiry by Mitchell as to whether he had any "V. O.," petitioner said that he did, at $36 per case, but that he did not have any "with * * * stamps on it" (A. 4, 6). He also mentioned another brand that was available "with the stamp"—"[Dewars] Ancestors"—the cost of which was $42 a case and would be "a real good deal" (A. 4, 8).

Petitioner then explained that the stamps had been affixed in Scotland and that "they" had "forgot[ten] to take them off." He had several hundred cases of "the stuff," he said, and once it was in Mitchell's hands no one would be able to tell where he had bought it because it would be "in the exact same bottle and stamp and everything." Mitchell could "put it right on the counter, no problems" (A. 8-9). Mitchell answered, "that's better than our first conversation," explaining that he had assumed he would have to "moonlight, you know, doing all my work at 4 o'clock

in the morning." Petitioner interjected, "No! No! This stuff has got the stamps on it, Jim" (A. 9).

Petitioner specified that delivery would be made in Nogales. When Mitchell observed that he had a station wagon and that maybe he could "bring a couple of blankets or something," petitioner assured him that that would be all he would need. He suggested that, if anyone asked questions on the return trip, Mitchell could say that a friend owed him money and gave him the liquor in payment (A. 10). The transaction was to be on a "strictly cash" basis, petitioner said, with payment to be made "when the merchandise changes hands" (A. 5). Petitioner then instructed Mitchell to get his money together and call when he knew what he wanted (A. 6).

On April 3, 1969, Mitchell called petitioner and—in a similarly recorded conversation (Tr. 41-42, 398-399)—ordered five cases of Haig and Haig, five of Seagrams V. O., and five of Dewars Ancestors (B. 4). Petitioner accepted the order, said that the total cost would be $630, and told Mitchell he would call him the next morning to let him know when to pick up the liquor (B. 5).

The following morning, petitioner called Mitchell at the Tidelands, told him the whiskey was ready, and directed him to proceed to Nogales and call him from the lobby of the El Dorado Hotel (Tr. 400-401). Equipped with $630 in bills, the serial numbers of which had been recorded and which had been dusted with a powder that became fluorescent under a certain type of "black light," Mitchell, followed by Customs agents, drove to the El Dorado in a Plymouth

station wagon, called petitioner from the lobby, and was informed by petitioner that someone would meet him there shortly (Tr. 47-51, 100-101, 103-105, 249, 322-323, 401-402). A few minutes later Jose Velez arrived in a taxi, ascertained Mitchell's identity, and said to him, "I am Joe, I don't know you, you don't know me, let's go" (Tr. 249, 402, 408).

Accompanied by Velez, Mitchell drove to the home of one Calixtro, an employee of Imports-Exports, located at the western outskirts of Nogales (Tr. 249-250, 271-272, 289, 328, 333, 402-403). At Velez' direction, Mitchell parked the station wagon beside a green panel truck at the residence; the two proceeded to transfer 15 cases of Scotch whiskey, corresponding in quantities and brands with those ordered by Mitchell, from the truck to the station wagon (Tr. 106-107, 122-123, 149-152, 161-162, 329, 403-404, 406-407). The contents of ten of the cases (those described in the indictment, see Pet. App. 1a) lacked stamps evidencing compliance with federal tax laws (Tr. 149-152, 161-162, 244-245).[3] Mitchell paid Velez the

[3] Only the Dewars Ancestors' bottles had proper federal strip stamps affixed to them (Tr. 162). The remainder bore either Canadian or voided United States stamps (Tr. 149-152, 161-162). The 15 cases had been withdrawn from the Imports-Exports warehouse the preceding afternoon (following Mitchell's placement of his order with petitioner) under the supervision of the Customs inspector on duty at the warehouse. They were at that time delivered to Velez, who had thereupon transported them into Mexico in the green panel truck (Tr. 179-192, 641-643). It does not appear how or where Velez reintroduced them into the United States, but it is undisputed that no import duty was paid on them (cf. Tr. 232-239; Pet. 6-7).

$630. In response to an inquiry by Velez as to when he would be coming back for another load, Mitchell stated that he would call petitioner when he was ready (Tr. 405).

Velez then drove the panel truck to Imports-Exports, entered the premises, departed 20 minutes later, and crossed in the truck into Mexico (Tr. 250-251, 331, 481-483, 498, 523). A few minutes after Velez' departure from the warehouse, petitioner was seen standing at the entrance (Tr. 497-498). That same afternoon petitioner was arrested pursuant to warrant in his office (Tr. 363-364). Examination of his hands under the "black light" revealed fluorescent specks on his fingers (Tr. 108-116, 366-367, 483-484, 505-507). While being driven by Customs agent John Dennis and another agent to Tucson for his preliminary hearing, petitioner said to Dennis, "John, you know what I have done and I know what I have done" (Tr. 918, 940). He further said that it had been his understanding that "if you came up short on your entries all you had to do was pay your duties and Internal Revenue Taxes" (Tr. 940).

On the following day, all but $200 of the $630 purchase money was found on the warehouse premises; it was in a bank bag containing the previous day's receipts (Tr. 117-119, 301-302, 368-370).

ARGUMENT

1. Petitioner contends that the trial court erred in excluding from evidence the transcript of a telephone conversation between Velez and Customs inspector William Eaton, which Velez, in collaboration

with petitioner (cf. Tr. 857), tape-recorded without Eaton's knowledge (Pet. 3, 17-26). The evidence was offered for the purpose of showing the bias, prejudice, and bad motive that allegedly permeated the investigation and prosecution of petitioner (Tr. 874-881). The relevant facts, adduced at a hearing out of the presence of the jury at which Eaton and Agent Dennis testified (Tr. 824-857), are as follows:

On Sunday afternoon, September 21, 1969, during a weekend recess in the trial,[4] Eaton, who was generally familiar with the case but had neither participated in it as an investigator nor witnessed any of the pertinent events (Tr. 877), met Velez by chance on the street in Nogales, a few blocks from the border (Tr. 826, 839). Eaton had a discussion with Velez at this time which caused him to believe that Velez might be persuaded to testify for the government (Tr. 839-841).[5] Eaton later told Agent Dennis about the encounter and said he thought Velez

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[4] The trial had been adjourned from the preceding Friday to the following Tuesday (Tr. 821-822). The government had rested (Tr. 547) and the defense's case was in progress.

[5] Velez asked Eaton how the Puchi trial was going. After estimating that it would conclude the following Tuesday, Eaton said that he had thought Velez might testify at it but that it was probably too late for him to do so then since the prosecution had rested. Velez asked why the government should "want" him, remarking that he was "just a little guy" who had merely "follow[ed] instructions" and that "My goodness, it was only ten cases." Eaton said he thought the government was more interested in petitioner than in Velez from a prosecutive standpoint. Velez was "interested in coming back" to the United States and said that he did not want to remain in Mexico for the rest of his life (Tr. 839-840).

wanted to cooperate (Tr. 828, 848, 854). Dennis, who had participated in the investigation and had testified as a government witness, told Eaton that if Velez wanted to come up and tell the truth—"the facts the way they are"—he would be glad for him to do so and would speak to the United States Attorney about the possibility of "get[ting] him up here" (Tr. 828, 841, 846, 848, 854-855). Dennis expected Eaton to communicate with Velez again; however, he gave Eaton no authority to say anything other than what he had been told by Dennis (Tr. 854-855).

Eaton then called Velez, learned he was out, and left word for him to call Eaton when he returned (Tr. 825-843). The recorded conversation occurred when Velez, around midnight, called back (Tr. 825, 832-838). Eaton, who had retired, was "half asleep" during it (Tr. 830). The conversation was "half in English and half in Spanish" and Velez' English was "about as bad as [Eaton's] * * * Spanish" (Tr. 825-826). In the conversation (Pet. App. 11a-15a; Tr. 832-838), the tape of which required extensive interpretation by the court interpreter, Eaton told Velez that he had talked to Dennis and that Dennis was going to inquire about getting a pardon for Velez if Velez would testify for the government and say what Dennis would tell him to say (Pet. App. 11a-13a).[6] In response to a number of pointed inquiries by Velez as to whether it would make any difference if he told

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[6] Eaton explained at the hearing that in referring to a "pardon" he had meant "immunity" or "safe passage," but that, not knowing how to express that thought in Spanish, he had used the Spanish word for pardon instead (Tr. 829).

a "lie" against petitioner, Eaton seemed to indicate that it would not (Pet. App. 12a-14a).[7]

The court of appeals was "incline[d] to the view" that the district court's ruling, refusing to admit the taped conversation and the testimony concerning it, was error, but held that the ruling was not prejudicially harmful in light of all the facts and circumstances and the limited purpose for which the evidence was offered (Pet. App. 8a). In light of the very substantial evidence of petitioner's guilt, the conclusion that the ruling, if error, was not of reversible dimension was clearly correct.

Moreover, the district court's decision not to admit may well have been a proper exercise of its discretionary power to exclude irrelevant and collateral evidence. Eaton's apparent improprieties were evidently the product of his limited ability to speak and understand Spanish. Even if this were not so, there was no evidence that Dennis had authorized such improprieties; his possible authorization was the only basis on which the taped conversation might have been admissable (Tr. 877-878).[8] Since the issue for which petitioner sought to introduce the conversation

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[7] Eaton testified at the hearing that three or four times during the conversation Velez had asked him "this one thing" in Spanish about "lies" and that he kept answering "Uh-huh," indicating he understood, but that in fact he had never fully understood what Velez meant (Tr. 831-832, 839, 843-844).

[8] There is no suggestion that government counsel authorized or instigated the approach to Velez or was in any way pertinently involved. Defense counsel specifically disclaimed any such contention (Tr. 860-861, 875-876).

—*i.e.*, the government's prejudice and bad motive in its investigation and prosecution of petitioner—was peripheral, the trial court might properly have decided not to prolong the trial further by calling on the jury to evaluate evidence about conversation that appeared to be irrelevant.

2. Petitioner moved before trial, pursuant to Rule 15(a), Fed. R. Crim. P, for an order authorizing him to take the deposition of Velez in Mexico for use in his defense at trial. In affidavits submitted in support of the motion, Velez accepted responsibility for the offenses alleged in the indictment, exonerated petitioner of any wrongdoing, and stated his willingness to be deposed in Mexico; he declined, however, to testify at petitioner's trial because entry into the United States for such purpose might subject him to arrest and prosecution on the charges. The motion was denied. At trial, following disclosure of the telephone conversation between Velez and Eaton, the motion was renewed and again denied (Pet. App. 5a-7a; Tr. 858, 872-873). Petitioner's challenge of these rulings (Pet. 13-17) is without merit.

Rule 15(a) provides that "[i]f it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court * * * may upon motion * * * order that his testimony be taken by deposition * * *." There was nothing in the tendered affidavits, as the court below noted, tending to establish that Velez was unable to, or prevented from, attending petitioner's

trial within the meaning of the Rule. His only stated reason for not attending was fear of arrest and prosecution if he returned to the United States. The Rule's benefits are not available merely because the person whose deposition is sought is unwilling to attend the trial—where, for example (as here), he is a fugitive from justice. *United States* v. *Hayutin*, 398 F. 2d 944, 954 (C.A. 2), certiorari denied, 393 U.S. 961; *United States* v. *Kelly*, 349 F. 2d 720, 769-770 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Rosenstein*, 303 F. Supp. 210, 212 (S.D. N.Y.); *United States* v. *Figueroa*, 298 F. Supp. 1215 (S.D. N.Y.); *United States* v. *Soblen*, 203 F. Supp. 542, 568-569 (S.D. N.Y.), affirmed, 301 F. 2d 236 (C.A. 2), certiorari denied, 370 U.S. 944; *United States* v. *Van Allen*, 28 F.R.D. 329, 346 (S.D. N.Y.), affirmed *sub nom. United States* v. *Kelly*, *supra*.

Moreover, the grant or denial of relief under the Rule is discretionary, see *United States* v. *Hayutin*, *supra*, and there is no basis here for a claim of abuse. Following disclosure of the Eaton-Velez telephone conversation, the district court, to accommodate petitioner, took the unusual step of quashing the arrest warrant that had been issued for Velez and granting him safe passage from Mexico to the courtroom and back—subject only to his being liable thereafter for perjury in the event that he testified falsely. Velez declined the opportunity (Pet. App. 7a; Tr. 858-873). The court of appeals correctly concluded in these circumstances that the district court's handling of the matter had been proper (Pet. App. 7a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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